Supreme Court, U.S.
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No. 02-1086

In the Supreme Court of the United States

POWER ENGINEERING COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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25 pp

QUESTION PRESENTED

The question presented, in a case in which petitioners and the United States have settled the litigation with no reservation of rights to appeal, is:

Whether the United States may bring an enforcement action against petitioners under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, after the State of Colorado had resolved a separate enforcement action under a federally authorized program that sought compliance with different waste regulation requirements.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 303 F.3d 1232 (Pet. App. B1-B16). The decision of the district court is reported at 125 F. Supp. 2d 1050 (Pet. App. C1-C44).

JURISDICTION

The judgment of the court of appeals was entered on September 4, 2002. On November 14, 2002, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including January 17, 2003, and the petition was filed on that date (Pet. App. A1). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Following the court of appeals' issuance of its mandate, the district court granted the parties' joint motion to terminate the litigation. See App.,

infra, 1a-6a. The United States submits that the question presented in the petition for a writ of certiorari accordingly is moot. See pp. 9-11, *infra*.

STATEMENT

The United States brought an action against petitioners under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, to compel petitioners to comply with RCRA's financial assurance requirements for hazardous waste facilities. Petitioners contended that the United States was precluded from bringing that action because the State of Colorado had previously brought an enforcement action against petitioners, seeking compliance with different hazardous waste requirements. The district court rejected petitioners' argument and ultimately ruled that petitioners were obligated to provide financial assurances in the amount of $2,119,044. See Pet. App. C11-C33; *id.* at B5. The court of appeals affirmed. *Id.* at B1-B16. Upon joint motion of the parties, the district court reduced the amount of the financial assurances to $1,324,102 and terminated the litigation, subject to the district court's continuing jurisdiction over petitioners' financial assurance obligations. App., *infra*, 1a-6a.

1. Congress enacted RCRA to address serious environmental and health dangers arising from the generation, management, and disposal of solid waste. Subtitle C of RCRA, 42 U.S.C. 6921-6939e, establishes a "'cradle to grave' regulatory structure for overseeing the safe treatment, storage and disposal of hazardous waste." *United Techs. Corp.* v. *EPA*, 821 F.2d 714, 716 (D.C. Cir. 1987). Subtitle C requires the Environmental Protection Agency (EPA), which administers RCRA, to develop a federal hazardous waste program, including regulations that establish standards applicable to gen-

erators and transporters of hazardous waste, and owners and operators of hazardous waste treatment, storage, and disposal facilities. See 42 U.S.C. 6922-6924.

In accordance with RCRA, EPA has promulgated regulations requiring that owners and operators of hazardous waste treatment, storage, and disposal facilities satisfy financial requirements for closure costs, post-closure costs, and third-party liability. See 42 U.S.C. 6924(a) and (t); 40 C.F.R. 264.140 *et seq.* Those regulations ensure that the owner or operator of a facility has secured funds to provide liability coverage until the facility is finally closed and to cover the cost of closure and post-closure care. EPA's "financial assurance" requirements protect the public from bearing those costs at some later date. See, *e.g.*, 46 Fed. Reg. 2821 (1981); see also 47 Fed. Reg. 15,047 (1982).

RCRA further provides that EPA may authorize a State to carry out a hazardous waste program "in lieu of" the federal hazardous waste program. 42 U.S.C. 6926(b). To receive authorization, a State must establish a hazardous waste program that is equivalent to and consistent with the federal program, and the State must provide for adequate enforcement of the authorized requirements. 42 U.S.C. 6926(b); 40 C.F.R. Pt. 271. Once EPA has authorized a State's hazardous waste program, the authorized State's requirements, rather than the equivalent federal requirements, become the body of requirements that govern facilities within the State. See, *e.g.*, *United States* v. *MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 43-46 (1st Cir. 1991).

EPA's authorization of state programs accomplishes two principal goals: (1) the authorized state requirements replace the equivalent federal requirements within the State, so that regulated entities need no

longer comply with a separate state hazardous waste program as well as equivalent federal requirements (42 U.S.C. 6926(b)); and (2) the State's authorized requirements become federally enforceable as requirements of RCRA Subtitle C (see 42 U.S.C. 6928(a)(2)). Regardless of federal authorization, States may continue to enforce the hazardous waste requirements in state statutes and regulations using state enforcement authority.

RCRA encourages States to seek authorization of state hazardous waste management programs. See 42 U.S.C. 6902(a)(7). At the same time, RCRA directs EPA to ensure that hazardous wastes are managed nationally in a consistent and effective manner. See 42 U.S.C. 6902(b). Thus, while States may assume primary responsibility for program administration, EPA retains oversight responsibilities concerning the activities regulated under the authorized state programs. RCRA also grants EPA independent authority to take direct enforcement action against a violator of RCRA requirements in a State with an authorized hazardous waste program, so long as it informs the State before taking action. 42 U.S.C. 6928(a).

On November 2, 1984, EPA authorized Colorado's hazardous waste program, which is now managed by the Colorado Department of Public Health and Environment (CDPHE). 49 Fed. Reg. 41,036 (1984). From time to time, Colorado has sought and obtained from EPA additional authorizations for revisions to its hazardous waste program. Colorado's federally authorized financial responsibility regulations are equivalent to and consistent with the federal regulations. See 6 Colo. Code Regs. Pt. 266 (2002).

2. Since 1968, petitioners have operated a metal refinishing and chrome electroplating business located in Denver, Colorado. Pet. App. B4. Petitioners' activi-

ties produced 13 different waste streams and more than 1000 kilograms per month of hazardous waste. *Ibid.* Nonetheless, petitioners failed to comply with federal or state hazardous waste management requirements. *Ibid.*

In August 1992, CDPHE received information that chromium discharges traced to petitioners' facility had caused surface and groundwater contamination. See Pet. App. B4. CDPHE's inspections revealed that petitioners were engaged in the unlawful treatment, storage, and disposal of hazardous wastes. *Ibid.* CDPHE issued a Final Administrative Compliance Order to petitioners that identified numerous violations and required that petitioners remedy those violations. *Ibid.*; *id.* at C3-C5.

CDPHE's order neither identified violations of, nor directed compliance with, the RCRA-mandated financial assurance requirements. Pet. App. C5. The United States asked CDPHE to enforce the financial assurance requirements and informed CDPHE that, if it did not, the United States would bring its own enforcement action. *Ibid.* CDPHE failed to do so. Based on information that petitioner Lilienthal was considering divesting himself of his assets or leaving the country, the United States filed an enforcement action against petitioners in federal district court in Colorado, seeking to compel petitioners to comply with the financial assurance requirements and for other relief. *Ibid.* CDPHE supported the United States' effort to compel petitioners to satisfy financial assurance requirements. 5/11/98 Prelim. Inj. Hr'g Tr. 33, 84. The United States subsequently obtained a preliminary injunction requiring petitioners to provide financial assurances. Pet. App. C6; *United States* v. *Power Eng'g Co.*, 10 F. Supp.

2d 1165 (D. Colo. 1998), aff'd, 191 F.3d 1224 (10th Cir. 1999).

Following the court of appeals' affirmance of the preliminary injunction, the United States dismissed all of its claims against petitioners except the demand for financial assurances. Pet. App. C8. On cross motions for summary judgment, petitioners argued that the United States' enforcement action was barred by CDPHE's prior enforcement action, citing *Harmon Industries* v. *Browner*, 191 F.3d 894 (8th Cir. 1999).

The Eighth Circuit's decision in *Harmon* (which is reproduced at Pet. App. I1-I19) affirmed a district court ruling that a State's settlement of an enforcement action barred EPA from pursuing an ongoing EPA administrative enforcement action addressing the same violations. The Eighth Circuit stated that 42 U.S.C. 6926(b), which provides that EPA may authorize a state hazardous waste program "in lieu of" the federal program, also meant that state enforcement was "in lieu of" federal enforcement. *Harmon*, 191 F.3d at 897-898. The court recognized that RCRA expressly allows the United States to file an enforcement action in an authorized State, 42 U.S.C. 6928(a), but concluded that "[h]armonizing" this provision with Section 6926(b) meant that EPA has a secondary enforcement role in authorized States. *Harmon*, 191 F.3d at 899. According to the Eighth Circuit, that secondary role would allow EPA to take action only if the State took none or, in the alternative, to revoke federal authorization of the State's program pursuant to 42 U.S.C. 6926(e). 191 F.3d at 899. The Eighth Circuit also held that Section 6926(b) created a relationship of privity between EPA and the State and concluded that res judicata therefore barred the EPA action. *Id.* at 902-904.

The district court in this case rejected the conclusion reached in *Harmon* that Section 6926(b) limits federal enforcement in authorized States, noting that Section 6926(b) "primarily addresses the administration and enforcement of state regulations by authorized states, [while] Section 6928 concerns the federal enforcement of such regulations." Pet. App. C17. The district court concluded that "there is no reason to impose restrictions on federal authority [to enforce RCRA] not found explicitly in the statute." *Id.* at C18.

The district court also rejected *Harmon*'s reasoning respecting the res judicata effect of a state enforcement action. Pet. App. C30-C33. The district court observed that this Court has held that the United States is bound by the results of a suit to which it was not a party only when it has "a laboring oar in a controversy." *Id.* at C30 (quoting *Drummond* v. *United States*, 324 U.S. 316, 318 (1945)). The district court declined to adopt the Eighth Circuit's conclusion that EPA effectively pulled the "laboring oar" by authorizing the state hazardous waste program. *Id.* at C31-C32 (citing *Harmon*, 191 F.3d at 904).

Accordingly, the district court denied petitioners' motion for summary judgment and, instead, concluded that petitioners were in violation of RCRA for their failure to provide financial assurances. Pet. App. C42-C44. The district court subsequently held a trial on the outstanding factual issues and ultimately concluded that petitioners were obligated to provide financial assurances in the amount of $2,119,044. *Id.* at B5.

3. The court of appeals affirmed the district court's judgment. Pet. App. B1-B16. The court of appeals concluded that RCRA allows the United States to bring its own enforcement action in an authorized State despite a prior state enforcement action. *Id.* at B5-B13. The

court stated that petitioners' contrary argument "contradicts the plain language of section 6928," which expressly authorizes the United States to bring an enforcement action in an authorized State. *Id.* at B13.

The court of appeals reasoned that Section 6926(b) distinguishes between adopting and implementing a hazardous waste program and enforcing requirements under that program. Congress authorized a State to carry out the state program "in lieu of" the federal program, 42 U.S.C. 6926(b), but it expressly preserved, through Sections 6926(b) and 6928(a), the United States' power to enforce the elements of the state program, provided that the United States gives advance notice of the federal enforcement action, 42 U.S.C. 6928. See Pet. App. B9. The court of appeals further concluded that the Eighth Circuit's construction in *Harmon* went "well beyond the plain language of the statute" and imposed limitations on EPA's enforcement authority not found in Section 6928(a). *Id.* at B10. The court of appeals accordingly embraced EPA's construction, concluding that "EPA's interpretation of RCRA has substantial support in the text of the statute and is therefore a reasonable interpretation of the statute." *Id.* at B13.

The court of appeals also concluded that the United States was not bound by res judicata as a result of the CDPHE enforcement action against petitioners. Pet. App. B13-B15. Citing *Montana* v. *United States*, 440 U.S. 147, 153 (1979), and *Drummond*, *supra*, it concluded that the United States could not be bound by the results of the CDPHE suit because the United States was neither a party in that suit nor exercised control over the litigation. Pet. App. B14-B15 (citing *Drummond*, 324 U.S. at 316, and *Montana*, 440 U.S. at 154-155).

4. Following the court of appeals' decision, the parties entered into settlement negotiations. After the court of appeals issued its mandate, the parties filed a "Joint Motion and Memorandum to Terminate Litigation" with the district court. App., *infra*, 1a-4a. That motion asked the district court to modify its judgment to reduce petitioners' financial assurances obligation from $2,229,044 to $1,324,102. *Id.* at 3a. The joint motion also asked the district court to dismiss all other pending motions of the parties and to "[e]nter an order terminating this litigation subject to the Court's continuing jurisdiction over its Judgment." *Ibid.* The joint motion contains no reservation by petitioners of the right to appeal any issue in this case. On December 20, 2002, the district court issued an order granting the joint motion. *Id.* at 5a-6a.

ARGUMENT

This Court should deny the petition for a writ of certiorari because the district court has issued an order terminating the litigation and rendering the question presented moot. Moreover, notwithstanding petitioners' claim that the court of appeals' decision conflicts with a decision of the Eighth Circuit, there is no current need for this Court to address the issue because the decision in this case is correct, and the issue is unlikely to recur with sufficient frequency to call for this Court's review.

1. This Court exercises its jurisdiction only over live cases or controversies. U.S. Const. Art. III, § 2. See, *e.g.*, *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) ("[A]n actual controversy must be extant at all stages of review."). A federal court—including this Court—has no authority to "give opinions upon moot questions or abstract propositions, or to

declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992). Consequently, neither this Court nor the courts of appeals undertake review on the merits in cases that are settled during the course of appellate proceedings. See, *e.g*, *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 23 (1994); *Lake Coal Co.* v. *Roberts & Schaefer Co.*, 474 U.S. 120 (1985) (per curiam) (denying motion of parties requesting a decision on issues presented in a petition for writ of certiorari after the parties settled the case); *Vela* v. *City of Houston*, 276 F.3d 659, 682 (5th Cir. 2001) ("We have repeatedly recognized that settlement between the parties renders an appeal moot and requires dismissal of the issues that have been settled."); *Affholder, Inc.* v. *Preston Carroll Co.*, 866 F.2d 881, 885 (6th Cir. 1989) ("Settlement of a claim before a final adjudication moots the claim and deprives the federal judiciary of jurisdiction over the claim."); *International Union* v. *Dana Corp.*, 697 F.2d 718, 719 (6th Cir. 1983) (dismissing as moot a case that settled while on appeal).

The Joint Motion and Memorandum to Terminate Litigation, signed by counsel for each of the parties, constituted an agreement to settle the case. It prescribed the amount of financial assurances to be provided by petitioners; it requested the district court to modify the judgment amount to conform to that lower amount; and it asked the court to enter an order terminating the litigation. See App., *infra*, 1a-4a. The district court granted the motion in full, modifying the judgment as requested by the parties and terminating the action. *Id.* at 5a-6a.

The district court's order accordingly renders the question presented in this case moot. By virtue of the

Joint Motion and Memorandum to Terminate Litigation, petitioners agreed to be obligated to provide financial assurances in the agreed amount. The district court retained only "continuing jurisdiction over the judgment," App., *infra*, 6a, which preserved the district court's authority to ensure that petitioners' fulfilled their obligations under the judgment. Neither the joint motion nor the district court's order contained a reservation of a right to appeal any issue in this case, and no appeal, in fact, has been taken from the district court's modified judgment. Accordingly, there is no longer any controversy and the case is moot.

2. In any event, the court of appeals' decision is correct. Section 6928(a)(1) of RCRA authorizes the United States to take enforcement action if EPA determines that "any person has violated or is in violation of any requirement" of RCRA. 42 U.S.C. 6928(a)(1). Section 6928(a)(2) expressly addresses "the case of a violation of any requirement of [RCRA] where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 6926 of this title." 42 U.S.C. 6928(a)(2). In that situation, EPA

> shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section.

Ibid. Thus, the United States plainly retains the right to bring an enforcement action in an authorized State, subject only to the condition that it first give notice. If Congress had wanted to impose additional conditions or limitations on the United States' enforcement authority, it would have placed those restrictions, along with the notice requirement, in Section 6928(a)(2). For example, Congress has authorized private citizens to bring RCRA enforcement actions, but, in the same

provision authorizing citizen suits, Congress has specifically disallowed citizen action in those instances in which the "State has commenced and is diligently prosecuting a civil or criminal action." 42 U.S.C. 6972(b)(1)(B). Congress's failure to place a similar limitation on federal enforcement actions demonstrates that Congress did not wish to preclude federal enforcement actions seeking relief that the State has declined to pursue.

Petitioners argue at length that federal enforcement actions would "usurp" a State's enforcement role, Pet. 15-22, but petitioners' sole statutory basis for urging that RCRA precludes the federal enforcement action at issue here is Section 6926(b), which provides that a State that receives federal authorization to administer a hazardous waste program under RCRA is authorized to carry out such program "in lieu of the Federal program." 42 U.S.C. 6926(b). That Section, however, does not address, much less preclude exercise of, the federal government's enforcement power under Section 6928(a). Rather, Section 6926(b) provides that an authorized State

> is authorized to carry out such program in lieu of the Federal program under this subchapter in such State *and* to issue and enforce permits for the storage, treatment, or disposal of hazardous waste (and to enforce permits deemed to have been issued under section 6935(d)(1) of this title) * * *.

42 U.S.C. 6926(b) (emphasis added). As the district court and court of appeals pointed out, RCRA refers separately to a State's carrying out its authorized hazardous waste program "in lieu of" the federal program and to a State's exercise of enforcement powers that necessarily co-exist with the federal enforcement

powers set out in Section 6928(a). Pet. App. B8-B9, C16-C18. Section 6926(b) plainly does not provide that a State *enforces* its program "in lieu of" federal enforcement, and Section 6926(b) cannot sensibly be read to displace the federal government's express enforcement powers. *Ibid.* See *Freytag* v. *Commissioner*, 501 U.S. 868, 877 (1991) (Statutory interpretations that "render superfluous other provisions in the same enactment" are disfavored.).

The court of appeals also correctly concluded that the United States could not be barred from bringing its own enforcement suit by principles of res judicata. As this Court made clear in *Montana*, 440 U.S. at 155, and *Drummond*, 324 U.S. at 318, the United States cannot be subjected to the bar of res judicata if the United States neither was a party to nor assumed control of the prior litigation. Petitioners point to no evidence that the United States assumed control of the CDPHE's enforcement action. Indeed, any claim that the United States controlled the state action is particularly far-fetched where CDPHE declined EPA's request to seek financial assurances from petitioners. Pet. App. B5.

3. Petitioners claim that the court of appeals' decision in this case conflicts with the Eighth Circuit's decision in *Harmon*, but even if that is so, there is no need for this Court to resolve that asserted conflict at this time. The United States rarely undertakes RCRA enforcement actions against a party if an authorized State has previously brought its own enforcement action. Indeed, although Congress enacted RCRA in 1976, no court of appeals had occasion to address the issue until *Harmon*, which was decided in 1999. The Tenth Circuit's decision in this case is the only other

court of appeals decision that squarely addresses the issue presented here.

The issue is not likely to recur with significant frequency. As EPA has explained to Congress, it is unusual for the federal government to undertake enforcement action in the wake of a state enforcement action under any of three major federal environmental statutes—the Clean Water Act, 33 U.S.C. 1251 *et seq.*, the Clean Air Act, 42 U.S.C. 7401 *et seq.*, and RCRA. See *Enforcement of Environmental Laws: Hearing Before the Senate Comm. on Environment and Public Works*, 105th Cong., 1st Sess. 156-162 (1997) (*Hearing*) (statement of Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance, EPA).

For example, during fiscal years 1992 through 1996, the States brought 50,856 enforcement actions under those three major environmental programs. See Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, *Pub. No. 300-R-98-003, Enforcement and Compliance Assurance Accomplishments FY 1997*, at 2-1, tbl. A-6 (1998). Yet, during fiscal years 1992 through 1994, the federal government brought an enforcement action after the conclusion of a state enforcement action in only 30 instances under all three statutes combined. *Hearing* 161. During fiscal years 1994 and 1995, EPA brought such actions in a total of 18 cases. *Id.* at 162. During fiscal year 1996, EPA filed its own actions following a state action in four cases. *Ibid.*

Accordingly, there is no reason to believe that "a considerable number of suits are pending in the lower courts which will turn on resolution of these issues." *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 237 (1964). It is conceivable that the issue presented here might eventually merit this Court's examination.

But there is no warrant for review at this time, particularly in a case that is moot.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2003

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 97-B-1654

UNITED STATES OF AMERICA, PLAINTIFF

v.

POWER ENGINEERING COMPANY, REDOUBT, LTD., AND RICHARD J. LILIENTHAL, DEFENDANTS

JOINT MOTION AND MEMORANDUM TO TERMINATE LITIGATION

[Filed Dec. 19, 2002]

Plaintiff, the United States and Defendants, Power Engineering Company, Redoubt Ltd., and Richard J. Lilienthal, respectfully hereby submit this joint motion and memorandum to terminate the above captioned litigation to the Court. Plaintiff and Defendants state as follows:

1. On February 28, 2001 the Court entered Findings of Fact, Conclusions of Law, and Order directing that:

> Defendants provide $2,119,044 in financial assurances within 60 days of the date of this Order in the form of surety bond guaranteeing payment into a closure or post closure trust fund or in any other

form acceptable to the plaintiff and specified in Part 266 [6 Colo. Code Regs. 1007-3 Part 266]; and

Obtain liability coverage for sudden accidental occurrences in the amount of at least $1 million per occurrence with annual aggregate of at least $2 million exclusive of legal defense costs;

2. On March 7, 2001 the February 28, 2001 Order was reduced to a Judgment;

3. On April 26, 2001 Defendants took appeal from that Judgment. On September 4, 2002, in *United States of America, v. Power Engineering Company; Redoubt, Ltd.; and Richard J. Lilienthal*, 303 F.3d 1232 (10th Cir. 2002), the Tenth Circuit affirmed the rulings of the District Court;

4. On October 15, 2002 (hereafter "Anniversary") Defendants submitted to Plaintiff and the State of Colorado an updated closure and post closure cost estimate in the amount of $1,132,164.00 for the work required at the Power Engineering Facility to respond to the Colorado Department of Health and the Environment's ("CDPHE") Compliance Order No. 94-07-29-01(Final). Plaintiff, in consultation with the State of Colorado, reviewed that estimate and found it to be satisfactory; and

5. On October 15, 2002, Defendants submitted to Plaintiff and the State of Colorado documents evidencing a financial assurances trust maintained by Defendants for the benefit of the CDPHE in the amount of $1,324,102.00 and documents evidencing third party liability coverage. Plaintiff, in consultation with the State of Colorado, reviewed those documents and found deficiencies. Defendants have agreed to seek the changes necessary to conform to the regulatory re-

quirements and are currently working to that end with their bank trustee and insurance carrier. In light of the updated cost estimate for the work to be completed under Compliance Order No. 94-07-29-01(Final) at the Power Engineering Facility, Plaintiff, after consultation with the State of Colorado, determined that the amount of financial assurances are sufficient in light of the estimated cost of the remaining work.

WHEREFORE, Plaintiff and Defendants jointly move that the Court:

A. Enter an order dismissing without prejudice all Plaintiff's and Defendants' pending motions;

B. Modify in part the February 28, 2001 Findings of Fact, Conclusions of Law, and Order and the March 7, 2001 Judgment to amend the amount of financial assurances to be maintained by Defendant to be no less than $1,324,102.00 as adjusted annually per Colo. Code Regs. 1007-3 Part 266;

C. Order Defendants to maintain financial assurances and third party liability insurance in accordance with the Order and Judgment, as modified, for the benefit of the CDPHE and the public and to review and update the closure and post closure cost estimates, financial assurances, and third-party liability insurance annually on the Anniversary date pursuant to 6 Colo. Code Regs. 1007-3 Part 266; and

D. Enter an order terminating this litigation subject to the Court's continuing jurisdiction over its Judgment.

Dated this 19th day of December, 2002.

Respectfully submitted,

Counsel For Plaintiff

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APPENDIX B

UNITED STATES DISTRICT COUR T FOR THE DISTRICT OF COLORADO
LEWIS T. BABCOCK, CHIEF JUDGE

Civil Case No. 97-B-1654 (OES)

UNITED STATES OF AMERICA, PLAINTIFF

v.

POWER ENGINEERING COMPANY, REDOUBT, LTD., AND RICHARD J. LILIENTHAL, DEFENDANTS

ORDER

[Filed Dec. 23, 2002]

Upon joint motion to terminate litigation, filed December 19, 2002,

IT IS ORDERED as follows:

1. This action is DISMISSED WITHOUT PREJUDICE,

2. The February 28, 2001, Findings of Fact, Conclusions of Law, and Order and the March 7, 2001 Judgment are modified to amend the amount of financial assurances to be maintained by defendants to be no less than $1,324,102.00 as adjusted annually per 6 Colo. Code Regs. 1007-3 Part 266;

3. The defendants are to maintain financial assurances and third party liability insurance in accordance with the Order and judgment, as modified, for the benefit of the CDPHE and the public and to review and update the closure and post closure cost estimates, financial assurances, and third-party liability insurance annually on the anniversary date pursuant to 6 Colo. Code Regs. 1007-3 Part 266; and

4. This litigation is terminated subject to this court's continuing jurisdiction over the judgment.

DATED: December 20, 2002

BY THE COURT:

/s/ LEWIS T. BABCOCK
LEWIS T. BABCOCK
Chief Judge